

05-19-00280-CR

EX PARTE CHRISTOPHER RION,

Appellant

THE STATE OF TEXAS,

Appellee

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STATE'S MOTION FOR REHEARING

In this case, this Court held that the trial court abused its discretion in denying appellant's application for writ of habeas corpus, which was based on the doctrine of collateral estoppel. *Ex parte Rion*, No. 05-19-00280-CR, 2019 WL 4386371, at *1 (Tex. App.—Dallas Sept. 13, 2019, no pet. h.) (mem. op., not designated for publication).

After this Court issued its opinion, however, the court of criminal appeals decided *Ex parte Adams*, No. PD-0711-18, 2019 WL 5057265 (Tex. Crim. App. Oct. 9, 2019). That case concerned two charges of aggravated assault that arose out of the same incident and the collateral-estoppel claim that followed after the defendant was acquitted of one of the charges. *Id.* at *1. On review, the Court unanimously held that collateral estoppel did not apply and that the second prosecution could proceed. *Id.* Along the way, the Court clarified the principles that guide a collateral-estoppel analysis—among them being the central role that a jury charge plays. *See id.* at *4.

Because *Adams* shows that the trial court did not abuse its discretion in denying habeas relief in this case, the State respectfully requests that this Court grant this motion for rehearing and affirm the trial court's order denying habeas relief. *See* Tex. R. App. P. 49.1.

What Adams Said

In *Adams*, Justin Romero and Luke Hisey became involved in a physical fight, which ended when Adams stabbed Justin and Justin's brother, Joe, who was standing nearby. *Adams*, 2019 WL 5057265, at *1. Adams was charged in two separate causes with aggravated assault against Justin and Joe. *Id.* at *2. The case alleging Justin as the victim went to trial first. *Id.* at *2. At trial, Adams admitted to the assault, but argued he that he was justified in using deadly force against Justin in order to defend Hisey from Justin. *Id.* at *5–6. *See generally* Tex. Penal Code §§ 9.32, 9.33. The court's charge instructed the jury on the use of deadly force in defense of another and added that the jury was to return a "Not Guilty" verdict if the State failed to overcome the defensive theory. *Adams*, 2019 WL 5057265, at *5. The jury ultimately found Adams not guilty, so he was acquitted of the aggravated assault of Justin. *Id.* at *2.

But because the charge for the aggravated assault against Joe was still pending, the State continued to prosecute Adams for that offense. *Id.* In response, Adams raised a pretrial application for writ of habeas corpus claiming that "the

second prosecution would involve the same issue that was decided in the first trial, namely, whether [he] was justified in using force in defense of a third person[,]” so “the second trial was barred by collateral estoppel.” *Id.* The State responded that “collateral estoppel did not apply because [Adams] was tried for allegedly committing aggravated assault against Justin, and [Adams’s] defensive theory—defense of a third party—related to whether [he] was justified in his use of force specifically against *Justin*.” *Id.* (emphasis in original). The second case, however, named Joe as the complainant. It therefore “involved a different issue because . . . the person against whom [Adams’s] use of force was directed, was *Joe*, a completely different person; thus, a jury decision that [Adams] was justified in using force against Justin was not a decision that [he] was justified in using force against Joe.” *Id.* (emphasis in original). The trial court agreed with the State and denied Adams’s application. *Id.* On appeal, the court of appeals reversed the trial court’s order, although the court of criminal appeals later granted the State’s petition for discretionary review and unanimously reversed the court of appeals. *Id.*

To decide what issue (if any) was necessarily decided in the first trial, the Court began with the jury charge: “In determining which facts were necessarily determined by the jury, the natural place to begin is the jury’s instructions from the first trial, which told the jury the particular circumstances under which it was to return a ‘Not Guilty’ verdict.” *Id.* at *4. The Court observed that Adams was charged

with aggravated assault under two paragraphs, each of which instructed the jury to find Adams not guilty under either of two circumstances: (1) if the State failed to prove that Adams committed aggravated assault, or (2) if the State failed to overcome Adams’s defensive theory. *Id.* at *4–5. From its review of the evidence of the first trial, the Court concluded that the “‘single rationally conceivable issue in dispute before the jury’ . . . was whether [Adams] was reasonably acting to defend Hisey against Justin’s attack.” *Id.* at *5 (quoting *Ashe v. Swenson*, 397 U.S. 436, 445 (1970)). The verdict, then, turned on the defensive issue alone. *Id.* at *5–6.

Then, to determine the scope of the jury’s findings on the defensive issue, the Court again turned to the jury charge. *See id.* at *6. Because the jury found Adams “Not Guilty,” the Court noted, it must have found that the State did not prove any of these three elements:

- (1) [Adams] did not believe his conduct was immediately necessary to protect Luke Hisey against *Justin Paul Romero’s* use or attempted use of unlawful deadly force; or
- (2) [Adams’s] belief was not reasonable; or
- (3) under the circumstances as [Adams] reasonably believed them to be, [Adams] would not have been permitted to use force or deadly force to protect himself against the unlawful force or unlawful deadly force with which [he] reasonably believed *Justin Paul Romero* was threatening Luke Hisey.

Id. (emphases in original). *See generally* Tex. Penal Code §§ 9.32, 9.33.

From the language in the charge, the Court observed, “Plainly, the jury’s ‘Not Guilty’ verdict meant it determined that [Adams] was justified in his use of force against ‘Justin Paul Romero,’ specifically.” *Adams*, 2019 WL 5057265, at *6. But the jury charge said nothing about Adams’s use of force against Joe. *Id.* Therefore, the acquittal did not mean that the jury necessarily decided that Adams was justified in using force against Joe. *Id.* In this respect, the court of appeals had “applied the brush too broadly.” *Id.* at *4.

It was possible that the jury discussed Adams’s use of force against Joe during its deliberations, but the court’s charge did not authorize a “Not Guilty” verdict on that basis. *Id.* at *7. “[Adams’s] acquittal[,]” the Court noted, “could have only come about due to the jury finding he was justified in using force against Justin.” *Id.* That conclusion was certain, but any conclusion vis-à-vis Joe was speculative. *See id.* “Perhaps the jury did agree during deliberations that [Adams] also justifiably used force against Joe. But that was not a basis the jury was given from which it could find [him] ‘Not Guilty.’” *Id.* And because an acquittal was not authorized on that basis, “the issue in regard to Joe was not necessarily decided in the first trial,” and “the State was not barred from litigating the issue in a second trial.” *Id.*

Applying *Adams* to Appellant¹

Under *Adams*, collateral estoppel does not apply here. Appellant's cases not only involve different complainants, as *Adams* did, but also different offenses. The jury in appellant's first trial (for the homicide of Claudena Parnell) could not have necessarily decided any fact against the State that will be at issue in the second trial—which will be for the aggravated assault of Claudia Loehr.

To determine what the jury necessarily decided in the first trial, “the natural place to begin” is the court's charge. *Adams*, 2019 WL 5057265, at *4. That charge does not mention Loehr or *bodily injury* at all, so it does not (and cannot) authorize acquittal based on any theory having to do with them.

In the charge, the court instructed the jury regarding recklessness as follows:

A person acts “recklessly” or is “reckless” with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances, as viewed from the standpoint of the person charged.

For a person to be deemed “reckless” there must actually be both a substantial and an unjustifiable risk that the result complained of will occur, and that the person acting was actually aware of such risk and consciously disregarded it.

¹ The State does not abandon any arguments made in the State's Brief, but neither will the State rehash those same arguments in this motion. Instead, the State will apply *Adams* to the facts here, which is intended to supplement the arguments that the State has already raised.

2 Suppl. C.R. at 3–4. The court then applied that definition when it described the findings that authorized a conviction for the manslaughter of Claudena Parnell:

Now, if you find beyond a reasonable doubt that on or about the 1st day of August, 2015, in the County of Dallas, State of Texas, **CHRISTOPHER MICHAEL RION**, hereinafter called Defendant, did then and there recklessly cause the death of an individual, **CLAUDENA PARNELL**, hereinafter called deceased, by operating a motor vehicle at a speed not reasonable or prudent for the conditions then existing or by failing to control the speed of said motor vehicle or by failing to keep a clear lookout or control of said motor vehicle, therefore striking the motor vehicle occupied by deceased . . . then you will find the defendant guilty of the offense of manslaughter, as charged in the indictment

2 Suppl. C.R. at 5–6 (emphases in original). By its own terms, the charge instructed the jury to consider whether appellant “recklessly *cause[d] the death of an individual*,” Parnell, and then included the acts that allegedly constituted his recklessness. *Id.* (emphasis added).

As in *Adams*—and, for that matter, as in all felony jury trials—the court’s charge instructed the jury how to determine whether appellant was guilty, and the jury was to determine appellant’s guilt only as the charge allowed. *See id.* at *4–5. *See generally* Tex. Code Crim. Proc. art. 36.14. And the jury was not permitted to find appellant not guilty for any reason having to do with Loehr or the term *bodily injury*. How could it have been? Neither Loehr’s name nor the term *bodily injury* appear in the court’s charge.

Appellant urged this Court “that the jury necessarily decided he was not guilty of the mens rea of recklessness” in the homicide case. *Rion*, 2019 WL 4386371, at *6. Even assuming that the jury decided that appellant did not recklessly cause the death of *Parnell*, it cannot be known whether the jury made any decisions concerning *bodily injury* or *Loehr*. In the terms of *Adams*, “[p]erhaps the jury did agree during deliberations” that appellant did not recklessly cause bodily injury to Loehr—although, because the charge did not define *bodily injury*, it is difficult to imagine how that could have happened—that theory “was not a basis the jury was given from which it could find” appellant not guilty. *Adams*, 2019 WL 5057265, at *7. Under the charge, no findings regarding Loehr or bodily injury would be *sufficient* to find appellant not guilty. So from the bare fact that the jury returned a general verdict of not guilty, it cannot *necessarily* be known what the jury thought of Loehr or any bodily injury. *See id.*

In its opinion, this Court expressed concern that “[u]sing the State’s very restrictive analysis would amount to a rejection of any use of collateral estoppel in criminal proceedings where the first judgment rested upon a general verdict of acquittal.” *Rion*, 2019 WL 4386371, at *8. Respectfully, the State would point out that its position is not so severe. As *Adams* explains, in order to know whether the jury necessarily found a fact when it acquitted a defendant, that fact—at a minimum—must have been sufficient to acquit him. *Adams*, 2019 WL 5057265, at

*7. If not, then it cannot be known whether the jury considered that fact at all, much less what its decision might have been. If, instead, appellant had been charged with committing an otherwise identical offense against two complainants (whether manslaughter, criminally negligent homicide, or aggravated assault), then the charge would give the jury all the necessary instructions for both offenses, and collateral estoppel might come into play. That is what happened in *Ashe v. Swenson*. See *Ashe*, 397 U.S. 436 at 445–46. But here, the offenses and their mental states are too different.

This Court also observed that “[t]he jury’s necessary determination was that appellant lacked the mens rea to be reckless with regard to the conduct causing the accident that resulted in [Parnell’s] death and [Loehr’s] injuries.” *Rion*, 2019 WL 4386371, at *8. But because the charge did not mention either Loehr or her injuries, it cannot be said the jury must have decided that appellant “lacked the mens rea to be reckless with regard to the conduct causing the accident that resulted in . . . [Loehr’s] injuries.” *Id.* Momentary physical pain satisfies the definition of *bodily injury*. See Tex. Penal Code § 1.07(a)(8); *Reyes v. State*, 83 S.W.3d 237, 239 (Tex. App.—Corpus Christi 2002, no pet.). Many acts can create a substantial and unjustifiable risk of bodily injury, while not creating a similar risk of death: throwing a paper airplane at someone’s head, for instance, or leaving LEGOs on the floor. The acts that allegedly constitute recklessness may be the same in both cases, even if the


outcome is not. So if a defendant, in one tragic act, causes bodily injury to one person and death to another, he may be reckless with respect to the bodily injury, but not the death.

In this case, a jury had the final say regarding the alleged manslaughter of Parnell, and the State respects that verdict. That verdict, however, was not the final say regarding the alleged aggravated assault of Loehr. The jury, following the court's charge, found appellant not guilty of manslaughter—and assuming the verdict rested on the mental-state issue, the jury may have decided that the acts alleged to constitute recklessness (speeding, failing to keep a lookout, and so on) did not create a substantial and unjustifiable risk of causing Parnell's death. But the charge was silent regarding Loehr and her alleged bodily injuries; the jury was not charged on those issues; and those issues were not sufficient to support a verdict of not guilty. So it cannot be determined from this general verdict whether the jury decided that those same alleged acts of recklessness created a substantial and unjustifiable risk of causing Loehr's bodily injuries.

Under *Adams*, collateral estoppel does not apply to the aggravated-assault prosecution.

The State therefore prays that this Court grant the State's motion for rehearing and affirm the trial court's order denying habeas relief.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I certify that a true copy of this document was served on Michael Mowla as counsel for appellant on October 13, 2019. Service was made via electronic service to michael@mowlalaw.com.



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